No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA) defines certain private and public entities as "employers" and prohibits them from discriminating against employees on the basis of age. The Act applies to private entities only if they are "engaged in an industry affecting commerce" and "ha[ve] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

The question presented is:

Under the ADEA, does the same 20-employee minimum that applies to private employers also apply to state agencies and political subdivisions of a State?

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 859 F.3d 1168 and reproduced at Pet. App. 1a-17a. The district court's unpublished decision may be found at 2014 WL 12725625 and is reproduced at Pet. App. 18a-37a.

JURISDICTION

The Court of Appeals entered judgment on June 19, 2017. Pet. App. 1a. On August 30, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to October 18, 2017. The certiorari petition was filed on October 18, 2017, and granted on February 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definitions of "person" and "employer" under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 630(a)-(b). Section 630 is reproduced in full at pages SA1-5 of the Statutory Appendix to this brief. The text of that section as originally enacted in 1967, Pub. L. No. 90-202, § 11, 81 Stat. 602, 605-07, is reproduced at pages SA6-9. The parallel section of Title VII, 42 U.S.C. § 2000e, which bears on the question presented here, is reproduced in full at pages SA10-14. Its text as originally enacted in 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253-55, is reproduced at pages SA 15-18.

INTRODUCTION

This case is about the only right way to read a statute: Beginning to end.

Petitioner Mount Lemmon Fire District is a small "special district" in Arizona with 11 full-time employees. Struggling with a budget shortfall, it was forced to lay off personnel. Respondents John Guido and Dennis Rankin claim the Fire District picked them because of their age. They sued under the federal Age Discrimination in Employment Act, or "ADEA."

At that point, every circuit to have confronted this situation had found that the ADEA does not cover political subdivisions as small as the Fire District. They had all held that § 630(b)—which defines the "employers" the ADEA covers—excludes any entity, public or private, with fewer than 20 employees. That conclusion flows naturally when one reads the statute in order.

The first sentence reads:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ....

This sentence, the circuits had unanimously held, is a baseline definition of the term "employer." The word "person" is defined very broadly in § 630(a) to include

"any organized groups of persons," easily encompassing local political subdivisions. So right off the bat, a political subdivision is covered, but only if it has at least 20 employees (and "affect[s] commerce").

The second sentence then clarifies what the first includes:

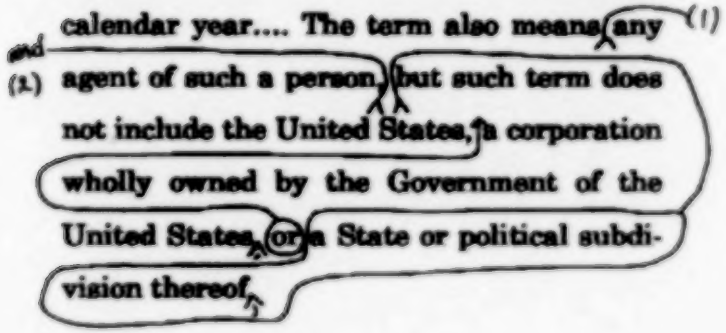
> The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Again, read it from the beginning—from the clause about "any agent." Every single regional circuit has found that this language (or language like it in other statutes) clarifies that traditional agency principles and respondeat superior are incorporated in the term "employer." True, one could read the phrase "also means" to create an entirely new category of employer—"any agent"—and subject all supervisors and human resources administrators to personal liability as employers. But imposing personal liability on employees who make or implement hiring and firing decisions would be a startling departure from age-old practice. So every circuit concludes that, in context, the term "also means" is a transitional phrase that signifies amplification or clarification; it refines the contours of what the first sentence already covers.

The phrase "also means" performs the same function for the next clause. It is a transitional phrase. It amplifies the first sentence, clarifying that States and their political subdivisions are included in, or incorporated into, the first sentence as employers (within the limits of the first sentence), while the federal government is not.

Is it the most elegant statute Congress ever drafted? It won't win any awards. But in fairness to Congress, it was not drafting this way from scratch. In 1974, it amended a preexisting definition to encompass certain governmental entities, essentially as follows:

> **The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.**



So Congress did not pull the words "also means" from the dictionary and attach them to "a State or political

subdivision" to create a new category of employer. The words were already in the statute and already serving a transitional, clarifying function regarding agency liability, rather than an additive function that would add new employer categories.

The only way the Ninth Circuit could reach its outlier position was to ignore most of § 630(b)'s text and context. It did not start from the first sentence or from the beginning of the statutory history. It skipped right through to the single word "also," and read that word to mean "in addition." It thus found that § 630(b)'s second sentence adds additional, distinct categories of employer, including "a State or political subdivision." And it found that this newly created category is not subject to the first sentence's limitations, including the 20-employee minimum (and, presumably, the "affecting commerce" limitation).

This is a classic case of a lower court improperly construing "[s]tatutory language ... in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Predictably, that approach yields inexplicable statutory anomalies. For example, it singles out public employers for burdens that it does not impose on private ones of comparable size—despite Congress's stated intention to treat public employers the same as private ones. Meanwhile, it actually disadvantages public employees by eliminating respondeat superior liability. It inexplicably and unnecessarily creates constitutional problems by subjecting public employers to liability even when they have no effect on commerce. And it puts the ADEA in tension with comparable antidiscrimination laws. The Ninth Circuit never explained why Congress would exempt small employers

from discrimination suits based on race, sex, nationality, and disability, but not those based on age.

The result is to subject tens of thousands of state and local entities to burdensome and costly federal litigation that they are ill-equipped to absorb—jeopardizing their ability to deliver critical services.

This Court should start at the beginning, and end with the only reading that makes sense: The Fire District is a "person" but not an ADEA-covered "employer" because § 630(b) defines that term to exclude a "person" with fewer than 20 employees.

The Ninth Circuit should be reversed.

STATEMENT OF THE CASE

Congress Enacts The ADEA But Excludes Governmental Entities

The ADEA prohibits employers from taking adverse actions because of an employee's age. *See* 29 U.S.C. § 623. A covered employer is liable under the statute for backpay, damages, and prospective relief like reinstatement. *See id.* §§ 216(b), 626(b). As originally enacted in 1967, the ADEA covered only private-sector employers. Congress accomplished that with the definitions of two statutory terms: "person" and "employer."

The original ADEA defined "person" expansively. The term meant (and still means) "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons."

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(a), 81 Stat. 602, 605 (codified at 29 U.S.C. § 630(b) (1967)).

The statute defined "employer," in turn, by incorporating and then qualifying the term "person":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ....[1] The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

Id. § 11(b), 81 Stat. 605. The definition of "employer" thus narrowed the broadly defined term "person" by excluding three types of entities: those that (1) are not "engaged in an industry affecting commerce"; (2) have fewer than "twenty-five ... employees"; or (3) are governmental entities.

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[1] For clarity, this reproduction of the original statute omits language establishing a transitional period during which a higher employee minimum temporarily applied. That period has expired and has no bearing on this case. *See* Pub. L. No. 90-202, § 11(b), 81 Stat. 605.

Congress Extends The Definition Of "Employer" To States And Their Political Subdivisions

In 1974, Congress amended the ADEA with language that remains in force today. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)). The revised statute retained the original definition of "person." *See* 29 U.S.C. § 630(a). But it expanded the definition of "employer" as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has ~~twenty-five~~ twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States~~, or a State or political subdivision thereof~~.

Compare id. § 630(b), *with* Pub. L. No. 90-202, § 11(b), 81 Stat. 605. This language narrows the original exclusions based on size and governmental affiliation. It drops the employee minimum from 25 to 20. And where the provision once excluded all governmental entities, it now excludes only the federal government

and federally owned corporations—not state or local entities.[2]

The 1974 amendments made clear that States and their agencies and political subdivisions are no longer categorically excluded from the ADEA's definition of "employer." *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). But the syntax of § 630(b)'s revised second sentence raised a question about the governmental entities newly subject to potential ADEA liability as "employers": Were they, like all private employers, subject to the 20-employee minimum, or had Congress created an entirely new category of potentially liable public employers with no size restriction at all?

The Circuits Unanimously Agree That Smaller Political Subdivisions Are ADEA-Exempt

Until this case, every court of appeals to confront that question—the Sixth, Seventh, Eighth, and Tenth Circuits—reached the same answer: Section 630(b)'s 20-employee threshold applies to state and local governments. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986).

The Seventh Circuit's opinion in *Kelly*, the first to address the issue, illustrates the majority approach.

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[2] Federal employers are covered by a separate section of the ADEA. *See* 29 U.S.C. § 633a.

Kelly held that § 630(b)'s second sentence "merely ... make[s] it clear that states and their political subdivisions are to be *included*" in the preceding "definition of 'employer,'" on the same terms as private entities. *Kelly*, 801 F.2d at 270-71, 273; *accord Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. Under that construction, the mention of state and local governmental entities in § 630(b)'s second sentence does not separately define all such entities as a distinct category of employers. Rather, it clarifies that those entities—already included in the expansive term "person"—are no longer categorically excluded from the person-based definition of "employer." Thus, state and local governments are treated the same as private businesses: They are covered by the ADEA only if they affect commerce and have 20 or more employees. *Kelly* grounded that construction in the ADEA's current and prior text, its purposes and legislative history, and its relationship to other federal antidiscrimination law. *See* 801 F.2d at 270-73.

Respondents Bring ADEA Claims Against The Fire District And The District Court Dismisses The Case

Petitioner Mount Lemmon Fire District is one of Arizona's political subdivisions—a special district that provides local fire protection and prevention services. Special districts are generally created by petition of local property owners or officials; some States may require elections. *See, e.g.*, Ariz. Rev. Stat. § 48-261; Colo. Rev. Stat. §§ 32-1-205–32-1-301; Municipal Research and Services Center of Washington, *Special Purpose Districts in Washington State* 19-20 (2003),

available at https://tinyurl.com/y7gxe3bg. Their budgets are often independent, drawn primarily from local property taxes. Ariz. Rev. Stat. § 48-261; *Special Purpose Districts in Washington State*, *supra*, at 28. Each district provides a specific service to the local community. In addition to fire prevention, they provide electricity, irrigation, waste management, water conservation, pest control, or any of dozens of other functions authorized by statute. *See, e.g.*, Ariz. Rev. Stat. §§ 48-301–48-6819; U.S. Census Bureau, *Individual State Descriptions: 2012* (hereinafter "*State Descriptions*") at ix (Sept. 2013), https://tinyurl.com/ybk3q2wh. These entities abound. As of 2012, there were 38,266 special districts nationwide, performing a vast range of functions. U.S. Census Bureau, *Special District Governments by Function and State: 2012* (hereinafter "*Special District Governments*") (Sept. 26, 2013), https://tinyurl.com/y8bdha3h; *State Descriptions*, *supra*, at x. They often have small staffs, drawn from the property owners who fund them.

In 2009, the Fire District confronted a fiscal crisis.[3] Property tax revenues had plummeted. The Fire District's budget shrank accordingly, roughly from $515,000 to $448,000. In trying to make ends meet, the Fire District put a high priority on preserving the jobs of its 11 full-time employees. It did everything it could to avoid layoffs. It ran bake sales. It took on

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[3] The facts in this paragraph are taken from the district court's opinion, Pet. App. 19a-21a, and the parties' submissions to the district court, *see* D. Ct. 69, at 1-3; D. Ct. 69-2, at 2-3, 7; D. Ct. 74-2, at 5; D. Ct. 74-3, at 5. Throughout, we use C.A. to refer to the Ninth Circuit's docket entries, and D. Ct. to refer to the district court's docket entries.

work on behalf of federal authorities. But those efforts fell short. The Fire District had to reduce annual expenses by tens of thousands of dollars, and temporary layoffs were its only choice. So it laid off Respondents John Guido and Dennis Rankin. Both of them had been hired by the Fire District in 2000, when Guido was in his late-thirties and Rankin his mid-forties. At the time of the layoffs, Guido was 46 (about the same age Rankin was when he had been hired) and Rankin was 54. *See* Pet. App. 19a-20a.

Respondents allege that the Fire District laid them off because of their age. The Arizona Civil Rights Act, which applies to a wide swath of the State's political subdivisions, bars discrimination on the basis of age. Ariz. Rev. Stat. §§ 41-1461(6), (10), 1463(B). But it does not apply to political subdivisions that, like the Fire District, have fewer than 15 employees. *Id.* § 41-1461(6). So Respondents instead sued under federal law, invoking the ADEA.

The district court granted summary judgment to the Fire District. Adopting the uniform view of the circuits, the court held that the ADEA applies to local political subdivisions the same way it applies to private employers: only if they have at least 20 employees. Pet. App. 20a-26a. The district court then reviewed the Fire District's employment records and held, as a matter of law, that the fire district had fewer than 20 employees in the relevant period, thereby excluding it from the ADEA's coverage. Pet. App. 26a-37a.

The Ninth Circuit Rejects The Longstanding Consensus

The Ninth Circuit reversed and remanded. It recognized that "four other circuits" had read § 630(b) to apply the 20-employee minimum in the public sector. Pet. App. 11a. But it rejected their unanimous consensus. The court's analysis began and ended with the dictionary definition of one word: The Ninth Circuit noted that "also" is ordinarily defined to mean "in addition," and so concluded that the words "also means ... a State or political subdivision" must be read to *add* all local governmental entities as "employers" under the statute—regardless of size. Pet. App. 7a, 13a-14a. In the court's view, the majority rule was too "underwhelming" to be "deemed reasonable" because it departed from the dictionary meaning of "also." Pet. App. 12a-13a. The Ninth Circuit barely addressed the remaining text of § 630.

SUMMARY OF THE ARGUMENT

I. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). The ADEA's text, context, and statutory history establish that § 630(b)'s 20-employee minimum exempts small political subdivisions.

A. Starting from the beginning, § 630(b)'s first sentence defines the term "employer" expansively to include political subdivisions, but only those with at least 20 employees. That sentence is based on the

broadly defined term "person," which includes "any organized groups of persons," words that certainly embrace political subdivisions like the Fire District. The definition of "person" also lists "corporations" and "associations," underscoring the term's breadth.

Additional statutory context confirms the point. Both § 630(b) and § 630(c) use the term "person" and then explicitly exclude "the United States" and other federal entities. This would be surplusage if the term "person" did not already include public entities. The conclusion becomes even clearer in light of § 630(b)'s statutory history. As initially enacted, § 630(b)'s first sentence defined the term "employer" based on the term "person," and its second sentence then excluded *all* governmental entities. Again, this would have been unnecessary unless the term "person" included such entities to begin with.

B. Because political subdivisions fall within the first sentence of § 630(b), they are subject to that sentence's limitations, unless something in the second sentence overrides them. The Ninth Circuit read the words "also means" to do so. Ignoring surrounding context, it construed those words to mean "in addition" and thus to create distinct categories of employers, including state agencies and political subdivisions of any size. But that reading is inconsistent with the rest of the statute. In context, "also means" clarifies the first sentence's definition of "employer"; it does not create new categories of employers.

To treat "also means" as an expansion would be unfathomable when considered alongside the words

"any agent of such a person"—it would define agents as a separate category of employer subject to personal liability. Every court of appeals to construe the ADEA's agent clause has rejected that reading, finding instead that "also means" operates as a clarification ("includes"), not as an expansion ("in addition"). The words "also means" must be given the same meaning when applied to the governmental clause at issue in this case: The phrase clarifies which governmental entities are included in the definition of "employer" in § 630(b)'s first sentence, without separately delineating additional categories of employers.

C. Two canons of construction resolve any lingering ambiguity in favor of applying the minimum-employee requirement. First, courts may not read a statute to override the "usual constitutional balance of federal and state powers" absent a clear statement from Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Ninth Circuit improperly altered that balance in ways Congress did not clearly intend—both by restricting how small state agencies may hire and fire their employees, and by overriding state judgments exempting small political subdivisions from the burdens of age-discrimination litigation. Second, the Ninth Circuit's reading would mean that the first sentence's "affecting commerce" requirement would not apply to small state agencies and political subdivisions. The majority rule avoids this constitutional problem.

II. Applying the ADEA's 20-employee minimum to political subdivisions also accords with Congress's stated goals in amending the statute. It places public and private employers on an equal footing, parity that

Congress expressly sought to achieve. And it accomplishes Congress's goal of harmonizing the ADEA with Title VII of the Civil Rights Act—the inspiration for the ADEA amendments that expanded coverage to include States and political subdivisions.

The Ninth Circuit's reading does just the opposite. It creates inexplicable disparities in the ADEA's treatment of public and private employers: State and local governments, unlike private businesses, would be covered regardless of their size or effect on commerce, yet *exempt* from respondeat superior liability. These anomalies make no sense even on their own terms. But they are particularly untenable in light of Title VII. That statute—along with the Americans with Disabilities Act (ADA)—applies the same employee minimum, commerce requirement, and respondeat superior principles to public and private entities alike. Under the Ninth Circuit's reading, therefore, the ADEA would bear no resemblance to its sister statutes in the public sector—even as it closely tracks them in the private sector.

These disparities are inexplicable, and together they yield a haphazard and illogical ADEA. The Ninth Circuit dismissed these problems because Congress amended Title VII in 1972 "us[ing] different language than it used in the 1974 ADEA Amendment." Pet. App. 15a. But the two statutes did not start in the same place; Title VII originally defined person more narrowly than the ADEA. So it is only natural that they took a different route to get to the eventual same answer.

III. The Ninth Circuit's reading of § 630 would have devastating effects on small state agencies and political subdivisions. Employee minimums serve important and salutary purposes, like "spar[ing] very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999). The 38,000 special districts nationwide are especially vulnerable, because they are often understaffed and underfunded. Congress could not have intended to threaten the survival of small political subdivisions.

The decision below should be reversed.

ARGUMENT

I. The ADEA's Text, Context, And Statutory History Establish That § 630(b)'s 20-Employee Minimum Exempts Small Political Subdivisions.

The Ninth Circuit's outlier reading of § 630(b) is "plausible in the abstract," *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016), but impossible in context. The Ninth Circuit ignored the forest for a tree—the single word "also." It assigned that word one possible meaning without regard for whether that meaning jives with the rest of the statute. It doesn't. The Ninth Circuit's reading must be rejected because it is "ultimately inconsistent with both the text and context of the statute as a whole." *Id.*

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*; *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). The reason is that "[i]n law as in life, ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion); *see id.* at 1092 (Kagan, J., dissenting) ("sometimes ... the dictionary definition of a disputed term cannot control").

It is true that "also" can mean "in addition," as the Ninth Circuit found. But that is not its only meaning. In fact, the Oxford English Dictionary does not even list that meaning first. Its first (non-obsolete) definition is: "Expressing amplification." It recites the definition, "as a further point ... tending in the same direction," before it ever gets to "in addition." Oxford English Dictionary (3d ed. 2011), https://tinyurl.com/also-definition. That is how it is used here: "Also" signifies amplification or transition, along the lines of "moreover." Congress used it to signify further clarification, rather than addition. In this context, "also means" signifies "includes" or "incorporates."

As every other circuit has concluded, this is the only meaning that makes sense when the ADEA is read as a whole—reading it from the beginning of the statute and not the middle, and understanding it in light of the provision's evolution. Under the majority reading, the first sentence presents a baseline definition of "employer" that includes political subdivisions, but only those with at least 20 employees. § I.A. The

second sentence does not override that limitation. Rather, it builds on that baseline definition of "employer," clarifying what that definition includes. § I.B. If the text, context, and statutory history leave any ambiguity, two canons of statutory construction decisively resolve the ambiguity in favor of retaining the employee minimum. § I.C.

A. Section 630(b)'s first sentence defines "employer" expansively to include political subdivisions, but only those with at least 20 employees.

We start at the beginning, a very good place to start. Section 630(b)'s first sentence limits the term "employer" to a subset of all "persons":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees ....

So the first step in construing this statute is to answer a question the Ninth Circuit declined to address: How does this sentence treat political subdivisions? The answer is that a political subdivision is a "person," and therefore is an ADEA-covered "employer" if, but only if, it (1) affects commerce and (2) has more than 20 employees. The statutory history confirms that this is what Congress intended.

1. Statutory text and context establish that the word "person" includes political subdivisions.

a. When Congress uses the word "person," it typically intends a broad construction. Even where Congress does not define the term, this Court has interpreted it to include local political subdivisions. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122, 125 (2003) (reading "person" that way under the False Claims Act); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (same for 42 U.S.C. § 1983). This Court has maintained that understanding across a variety of statutory definitions. *See, e.g., Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 56 (1982) (antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities"); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 394-97 (1978) (Sherman Act and Clayton Act); *City of Lincoln v. Ricketts*, 297 U.S. 373, 375 (1936) (Bankruptcy Act); *see also Clinton v. City of New York*, 524 U.S. 417, 428 (1998) (finding that "in the context of the entire section [of a statute], Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person,'" and thus apply to New York City).

In the ADEA, Congress adopted an explicit—and broadly inclusive—definition of "person." Section 630(a) defines "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The culmination of this definition—"any organized

groups of persons"—most certainly embraces political subdivisions. As this Court has noted several times, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *E.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). "Organized" means "having a formal organization to coordinate and carry out joint activities." Webster's Third New International Dictionary 1590 (1993). And "group" means "a number of individuals bound together by a community of interest, purpose, or function." *Id.* at 1004.

Putting it all together, the words "*any* organized groups of persons" embrace political subdivisions. The Fire District, for example, is a "number of individuals" (its Board of Directors, EMTs, firefighters, and the property owners who fund them) with a "formal organization to coordinate and carry out activities" related to fire protection and prevention. There is "no indication whatever that Congress intended to limit the phrase" to private entities. *Ali*, 552 U.S. at 219-20 (internal quotation marks omitted). To the contrary, Congress's use of a catchall communicates that the term "person" should not be interpreted in a technical or limited fashion. The "catchall[]" in the ADEA's already "quite general" definition of "person" thus serves to "ensure beyond question" that the term broadly embraces political subdivisions. *Yates*, 135 S. Ct. at 1089 (Alito, J., concurring).

The mention of "corporations" and "associations" earlier in § 630(a) confirms the breadth of "person." This Court has repeatedly construed those terms to

encompass local governmental entities.[4] By using the same terms to exemplify the scope of "person" under the ADEA, Congress reinforced that public entities, no less than private businesses, qualify as "organized groups of persons."

b. Additional statutory context confirms that the definition of "person" is not limited to private entities. The second sentence of § 630(b) states that the term "employer" "does not include the United States, or a corporation wholly owned by the Government of the United States." Were the term "person" limited to private entities, there would be no need to expressly exclude the United States or publicly owned corporations; that exclusion would be surplusage. This Court is "reluctant to treat statutory terms as surplusage in any setting," and there is no ground to do so here. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Even more revealing is § 630(c). It provides that "[t]he term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States." 29 U.S.C. § 630(c). Here, too, the exclusion of federal agencies would be sur-

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[4] *See Chattanooga Foundry & Pipe Works v. City of Atl.*, 203 U.S. 390, 396 (1906) ("person," which the Sherman Act, 15 U.S.C. § 7, defines to "include corporations and associations," encompasses municipalities); *City of Lafayette*, 435 U.S. at 394-95 (same for the identical definition in the Clayton Act); *Ricketts*, 297 U.S. at 375 (same for "corporations" under the Bankruptcy Act's definition of "person").

plusage unless governmental entities otherwise qualified as "persons." *See TRW*, 534 U.S. at 31. But even more telling is the fact that § 630(c) singles out *federal* agencies for exclusion while making no mention of *state and local* agencies. Obviously, they are included—and the only way that can be is if state and local agencies are "persons."

This Court has drawn comparable inferences from analogous statutory exclusions. *Ricketts*, for example, read the Bankruptcy Act's definition of "person" to include municipalities in part because several provisions of the statute "expressly exclud[ed] municipal corporations in certain relations." 297 U.S. at 375. Those exclusions confirmed that municipal corporations "were intended to be included when, in the absence of exception, the reference is to 'corporations' generally, or to 'persons.'" *Id.* So too here: The express exclusion of "the United States, or a corporation wholly owned by [it]" means those federal entities are otherwise included. And if the term "person" covers the federal government, then it covers political subdivisions too.

2. Statutory history confirms that the term "person" has always included political subdivisions.

The conclusion that "person" in § 630 encompasses political subdivisions "becomes even clearer when the original wording of the ... provision is taken into account." *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014). The evolution of the statutory language over time—the statutory history—is "part of the context of the statute." Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *see Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2050 (2017) (statutory history is "instructive"); *see also Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1180 (10th Cir. 2011) (Gorsuch, J.) (proper reading of statute was "amply confirmed by the Act's statutory cross-references and history and by the circumstances surrounding its adoption"). And here, that context confirms that the term "person" has always included governmental entities.

Section 630(a)'s definition of "person" has been the same from the start. But § 630(b)'s definition of "employer" has changed. In 1967, its first sentence, like the current version, defined certain "persons" as employers. *See* Pub. L. No. 90-202, § 11(b), 81 Stat. 605. But § 630(b)'s second sentence originally excluded all governmental entities: It said that the term "employer" "does not include the United States, a corporation wholly owned by the Government of the United States, or *a State or political subdivision thereof*." *Id.* (emphasis added). That must mean that the term "person" has, from the moment of enactment, encompassed local governmental entities. If "person" did not extend that far, Congress would not have needed to exclude "political subdivisions."

3. The Ninth Circuit ignored the first sentence of § 630(b).

The Ninth Circuit ignored all of this when it summarily declared that "political subdivisions are not defined as persons in § 630(a)." Pet. App. 7a n.3. It mistakenly stated that "[t]he parties agree that ... the

term 'person' does not include a political subdivision of a State." Pet. App. 5a.

The Fire District made no such concession. While it did not dwell on the first sentence, it did urge the Ninth Circuit to follow the unanimous line of court of appeals decisions both explicitly and implicitly based on the premise that political subdivisions are "persons." *See* C.A. 34, at 1-3 (relying on *Cink*); C.A. 18, at 18-20 (relying on *Palmer*, *Monclova* and *Kelly*). The Tenth Circuit, for example, explicitly held that "person" must be read to "include political subdivisions." *Cink*, 635 F. App'x at 472 n.4. The Seventh Circuit, too, reasoned that § 630(b)'s second sentence merely "make[s] it clear that states and their political subdivisions are to be *included* in the definition of 'employer'" in preceding clauses—a definition that centers on "persons." *Kelly*, 801 F.2d at 271.

The Ninth Circuit just missed it. And that was its first critical error: Because the court started in the middle, it overlooked the critical term "person" in § 630.

B. Section 630(b)'s second sentence merely clarifies what is included in the first sentence's definition, without adding new categories of employers.

Before one even gets to the second sentence, then, political subdivisions fall within the first sentence of § 630(b) and therefore are subject to that sentence's limitations: They are not covered employers unless they engage in commerce and have at least 20 employees. So, the only way to sustain the Ninth Circuit's

reading is to conclude that something in the second sentence overrides those limitations.

The very notion seems implausible. As explained more fully below (at 40-43), Congress could not have intended to cover public employers who have no impact on commerce. And it is highly unlikely that Congress wanted to burden smaller public employers in ways that it declined to burden private employers, or that Congress would have wanted to single out age discrimination for exceptional treatment when it insulates smaller public employers from suits alleging discrimination on the basis of race, sex, nationality, and disability.

As every other circuit has held, the text of the second sentence does not override the first or invite all these anomalies. It reads:

> The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

In rejecting the majority rule, the Ninth Circuit concluded that "also" inevitably carried what it believed to be the primary dictionary definition, "in addition." Pet. App. 7a-8a. So it thought that § 630(b)'s second sentence defines additional, entirely distinct categories of employers—including States and politi-

cal subdivisions regardless of their size and, presumably, regardless of their effect on commerce. Under the Ninth Circuit's reading, then, § 630(b) has three distinct categories of "employer": "A—person" (who has at least 20 employees and affects commerce); "B—agent of person"; and "C—State-affiliated entities." Pet. App. 6a.

The Ninth Circuit did not even consider the alternative dictionary definition noted above (at 18), that "also" "[e]xpress[es] amplification" or transition. When viewed in context, the phrase "also means" does not signify that these are additional categories of covered employers without regard to size or impact on commerce. Rather, "tending in the same direction" as the first sentence, Oxford English Dictionary (3d ed. 2011), https://tinyurl.com/also-definition, the phrase clarifies that States and their political subdivisions are included in, or incorporated into, the first sentence as employers (within the limits of the first sentence), while the federal government is not.

The Ninth Circuit's reading of the second sentence, however grammatically plausible, is flatly incompatible with the agent clause, and therefore cannot be right. And it is also inconsistent with the ADEA's broader text, context, and statutory history.

1. The agent clause clarifies the scope of § 630(b)'s first sentence without adding a new category of employer.

After laying out its categories A, B, and C, the Ninth Circuit skipped right over B. Eliding critical text, the court asked only how to read the words "also

means ... a State or political subdivision" in isolation, without considering how its interpretation would affect the "any agent" clause that it omitted. *See* Pet. App. 7a-8a. Things look very different when you go from A to B. We start with the agent clause and then proceed to the clause at issue here, defining which governmental entities are included and which are excluded (call it the "governmental clause").

Both clauses follow the transitional phrase "also means." If the phrase "also means" adds a category of employer not covered by the first sentence, then the ADEA defines "any agent" of any person described in the first sentence as an "employer," as the Ninth Circuit indicated. But every court of appeals to construe the ADEA's agent clause has rejected that reading. They all agree that the agent clause merely clarifies § 630(b)'s first sentence, without defining agents as a separate category of employers in their own right. So "also means" operates as a clarification ("includes") not as an expansion ("in addition").

To treat "also means" as an expansion would be unfathomable. If agents were "employers," they would be *independently* liable for discriminatory employment practices. That necessarily follows from the ADEA's remedial provisions. Under § 626(b), any "employer" who violates the ADEA's prohibitions "shall be liable to the employee or employees affected" for backpay and damages. 29 U.S.C. §§ 216(b), 626(b). So if agents are an additional category of "employer," they are individually subject to suit. This would impose unprecedented personal liability on supervisors who act as agents for their own employers in making and car-

rying out employment decisions. Even the human resources functionary who sends a pink slip will be subject to personal liability. So an individual employee could face personal liability not just for the entire retroactive salary of a former colleague but for millions in damages for a class of hundreds of employees.[5]

The courts of appeals have uniformly rejected such extraordinary personal liability for agents.[6] Tellingly, they link their rationale to the neighboring employee minimum. "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). Reading the statute otherwise "would be incongruous." *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994). It would insulate the coffers of a 19-person company from the ADEA's

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[5] *See, e.g.*, EEOC, *3M to Pay $3 Million to Settle EEOC Age Discrimination Suit* (August 22, 2011), https://tinyurl.com/ybfqb9fc (noting $3 million settlement of ADEA claims by class of "hundreds of employees"); EEOC, *Republic Services to Pay Nearly $3 Million for Firing Older Workers Because of Age* (September 29, 2010), https://tinyurl.com/yd44qzjf (noting $2.9 million class action settlement under the ADEA).

[6] *See Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436, at *2 (6th Cir. 1998) (unpublished); *Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir. 1997) (unpublished); *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 n.8 (7th Cir. 1997); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993).

remedies, while subjecting the construction foreman or human resources functionary to crushing liability.

Instead, the circuits have unanimously interpreted the agent clause to carry a more prosaic and sensible function: clarifying the scope of § 630(b)'s first sentence by explaining what is included. Specifically, the agent clause establishes that persons who qualify as "employers" are subject to principles of agency liability, including respondeat superior. *E.g.*, *Birkbeck*, 30 F.3d at 510. For all the same reasons, the circuits have unanimously reached the same conclusion as to the essentially identical agent clauses in the ADEA's sister statutes, Title VII and the ADA. 42 U.S.C. §§ 2000e(b), 12111(5)(A). That includes all 12 regional circuits interpreting Title VII's agent clause[7] and every circuit to consider the issue under the ADA.[8]

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[7] *See Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990); *Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999); *Williams v. Banning*, 72 F.3d 552, 553-55 (7th Cir. 1995); *Smith v. St. Bernards Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994); *Miller*, 991 F.2d at 587-88; *Haynes v. Williams*, 88 F.3d 898, 898-899 (10th Cir. 1996); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

[8] *See Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 52 (1st Cir. 2011); *Walsh v. Nev. Dep't of Human Res.*,

So construed, the ADEA's agent clause is consistent with the statute's broader structure. And it still plays a critical role of including agency principles that the statute could otherwise be read to exclude. *See Monell*, 436 U.S. at 691 (§ 1983 does not impose respondeat superior liability on municipal "persons"); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 283-85 (1998) (Title IX of the Civil Rights Act does not impose respondeat superior damages liability on educational institutions).

2. Like the agent clause, the governmental clause clarifies the scope of § 630(b)'s first sentence by specifying which public entities it includes in its coverage.

Because the Ninth Circuit did not even address the unanimous consensus regarding the agent clause, it did not confront the central paradox of its reading: For the governmental clause to add a new category of liability for States and political subdivisions, the word "also" in § 630(b)'s second sentence must change meaning depending on which clause it modifies. On the one hand, according to the decision below, the governmental clause defines a new category of employers—state agencies and political subdivisions of any

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471 F.3d 1033, 1037-38 (9th Cir. 2006); *Hunt v. District of Columbia*, No. 02-7044, 2002 WL 1997987, at *1 (D.C. Cir. Aug. 29, 2002); *Corr v. MTA Long Island Bus*, 199 F.3d 1321, at *2 (2d Cir. 1999) (unpublished); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 744 (10th Cir. 1999); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *see also Koslow v. Pennsylvania*, 302 F.3d 161, 178 (3d Cir. 2002).

size. As to that clause, "also" means "in addition." Pet. App. 7a. On the other hand, as all seem to agree, the agent clause does not define a new class of employers, but merely clarifies what is included in the previous sentence. It's Schrödinger's clause.

That is an interpretive impossibility. As this Court has admonished, "[a] term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation ... the same way each time it is called into play." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (citation omitted); *see Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

If the phrase "also means" can have only one meaning as to both clauses, the only plausible solution is the majority reading: The phrase clarifies what is included in the definition of "employer" in § 630(b)'s first sentence, without separately delineating additional categories of employers. Specifically, it denotes which governmental entities are included in the previous sentence and which are not.

The clause's structure and syntax support this reading in at least two ways. First, given that § 630(b)'s first sentence already defines employer to include political subdivisions with at least 20 employees, it would be odd for Congress to choose the current language of the second sentence merely to add coverage for smaller political subdivisions. That would be like drafting a statute that "covers all humans over

the age of 20" and then saying it "also covers all left-handed people." If Congress had some reason to adopt such an odd structure, it would have avoided the inevitable confusion by saying "[i]t also means ... political subdivisions of fewer than twenty employees" or "it also means political subdivisions of any size," just as Congress would say "also covers all left-handed people regardless of age" in the example above if that is what it meant.

Second, "in addition" does not capture what the governmental clause achieves because that clause does not just add, but also subtracts. It identifies governmental entities that *are* covered and entities that are not covered. The whole structure is more along the lines of clarifying what is "included" than of stating what is "added."

This Court has had no problem adopting constructions that depart from a standard dictionary definition where compelled by the surrounding text. *Yates*, for example, declined to give the phrase "'tangible object' a meaning as broad as its dictionary definition" because "context ... tugs strongly in favor of a narrower reading." 135 S. Ct. at 1083 (plurality opinion); *see also id.* at 1089 (Alito, J., concurring in the judgment). Similarly, in *Bloate v. United States*, this Court rejected a construction of the Speedy Trial Act that "rests upon a dictionary definition of two isolated words" because it "does not account for the governing statutory context." 559 U.S. 196, 205 n.9 (2010).

Most on point is *McNally v. United States*, 483 U.S. 350 (1987). There, a statute proscribed conduct using two distinct phrases linked by the word "or":

"any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (emphasis added), *superseded by* Anti-Drug Abuse Act of 1988, Pub. L. 100-690 § 7603(a), 102 Stat. 4184, 4508. The issue before the Court paralleled the question presented here: whether "the money-or-property requirement of the latter phrase" also applies to the "scheme or artifice to defraud" mentioned in the first phrase—even though the two phrases are separated by a connecting term that is ordinarily disjunctive. *McNally*, 483 U.S. at 357-58.

This Court recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." *Id.* at 358. After considering how the language fit into the broader statutory scheme, however, the Court rejected the primary definition: The money-or-property requirement applied to both phrases, and the second phrase merely *clarified* the first by making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359. In keeping with *McNally*, the Court recently reaffirmed that "statutory context can overcome the ordinary, disjunctive meaning" of connecting terms like "or." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

The ADEA's context does exactly that with respect to the ordinary, additive meaning of "also." As in *McNally*, compelling textual and structural evidence outweighs the dictionary's generic reference.

3. Statutory history confirms that the function of § 630(b)'s second sentence has always been to clarify the scope of the first.

Had § 630(b)'s drafters started from scratch, they almost certainly would have found a clearer way to convey this meaning. But they reached the current language by amending an earlier version. The phrase "also means" was already in the second sentence—and has always meant "includes," functioning to clarify the scope of the first sentence.

As originally enacted, § 630(b) had three basic syntactic elements. It had a definitional baseline—call it [A]—the same definitional first sentence as the current version. Then came a second sentence with two-part inclusion/exclusion structure: "[B] The term [employer] *also means* any agent of such a person, [C] but such term *does not include* the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof." Pub. L. No. 90-202, § 11(b), 81 Stat. 605 (emphasis added). The "also means" clause [B] was thus a clause of inclusion: It clarified that the aforementioned employers were subject to basic principles of agency liability, as discussed above (at 27-31). And the "but" clause [C] was a term of exclusion: It subtracted governmental entities from the coverage of the baseline definition [A].

When Congress amended the ADEA, it maintained all of § 630(b)'s syntactic elements in the same structure: [A] a definitional baseline in the first sentence; [B] a clarifying "also means" clause of inclusion; and [C] a "but" clause excluding certain governmental entities. The only difference is that Congress shifted States and political subdivisions from [C] to [B]—from the governmental exclusion element to the clarifying clause of inclusion. (At the same time, Congress clarified that "any agency or instrumentality of a State or a political subdivision of a State" is also covered. 29 U.S.C. § 630(b).) One can imagine the drafters thinking that they achieved the desired clarification simply by moving political subdivisions from one side of the ledger to the other, along the lines of the edits indicated on page 4. Because "also means" merely clarified that principals could be liable for acts of agents, the drafters were justified in believing that the phrase would retain the original, clarifying meaning.

The result may not be a model of drafting precision. But when considered in light of the statutory history and read in light of its statutory context, it is easy to see how the drafters intended this provision to work. And this confirms that the construction endorsed by every other circuit is superior.

C. Any ambiguity must be resolved in favor of applying the minimum-employee requirement.

If the text, context, and statutory history are not enough, two canons of construction resolve any ambiguity in favor of the minimum-employee requirement:

(1) the prohibition against reading a statute to interfere with state governments without a clear statement from Congress; and (2) the doctrine of constitutional avoidance.

1. This Court has long recognized that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). For this reason, courts may not read statutes to override the "usual constitutional balance of federal and state powers" where Congress has not clearly expressed its intention to do so. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory*, 501 U.S. at 460).

Gregory applied this principle to the ADEA. The question there was whether the statute's protections—indisputably available to many state employees—extended to state judges in particular. 501 U.S. at 460. If judges were covered, States would have reduced "power to define the qualifications of their officeholders" by setting a mandatory judicial retirement age. *Id.* at 468. This Court held that it was improper to read the ADEA to intrude on "state governmental functions" in that manner without a clear statement from Congress. *Id.* at 470. Because the ADEA was ambiguous as to its application to judges, the Court read the ADEA not to apply. *Id.*

The same principle applies here, on two dimensions. First, recall that § 630(b)'s second sentence lists not just political subdivisions, but also "any agency or instrumentality of a State." The Ninth Circuit thus

read that sentence to expand *state* liability by sweeping in the small "agenc[ies] or instrumentalit[ies] of a State" along with small political subdivisions like the Fire District. The Ninth Circuit's reading will thus prohibit smaller state agencies from laying off certain employees. It will also require those agencies to hire back employees it has discharged. *See* 29 U.S.C. § 216(b) (allowing for reinstatement as a form of equitable relief).

Second, this reading overrides state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination litigation. Many States have chosen to enact their own antidiscrimination statutes, but to exempt state agencies and political subdivisions with less than a certain minimum number of employees. To take the most extreme example, Alabama's Constitution exempts state agencies altogether. *EEOC v. Walker Cty. Bd. of Educ.*, No. 6:10-CV-02626-LSC, 2012 WL 13020711, at *7 (N.D. Ala. Jan. 30, 2012). Arizona—the State where this case arises—has a Civil Rights Act that covers employers (including state agencies and political subdivisions) with at least 15 employees. Ariz. Rev. Stat. § 41-1461(6), (10) (definition provisions); *see id.* § 41-1463(B) (prohibiting age-based employment decisions). It has thus made the judgment that small fire districts, like Petitioner, and state agencies, like the Prescott Historical Society,[9] should be exempt from

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[9] *See* Arizona Dep't of Admin., *State of Arizona Workforce Report 2016* (hereinafter "*Arizona Workforce*") at 43 (2016), https://tinyurl.com/yd5jvbyj (as of 2016, Prescott Historical Society was an agency with 11 employees).

the burden of age discrimination litigation. Numerous other States have made similar judgments. The analogous age-based statutes in Alabama (for political subdivisions), Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, and South Carolina also have employee minimums of either 15 or 20.[10] Still other States have decided that single-digit employee minimums are appropriate; they are California (at least 5 employees), Connecticut (3), Delaware (4), Kentucky (8), Missouri (6), New Hampshire (6), New Mexico (4), New York (4), Virginia (5), and Washington (8).[11] Doubtless these States adopt these limits based on their own unique understanding of what burdens their own smallest governmental entities can bear.

On either dimension, the Ninth Circuit's reading of the ADEA would represent a substantial intrusion on "state governmental functions." *Gregory*, 501 U.S. at 468. Congress has the power to do this if it desires. But "[i]t is a power that [this Court] must assume Congress does not exercise lightly." *Id.* at 460. And certainly it does not exercise it ambiguously. If the question were close, the principle that Congress does not silently override state legislative regulation of its

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[10] Ala. Code § 25-1-20; Fla. Stat. § 760.02; Ga. Code § 45-19-22; La. Stat. § 23:302; Md. Code, State Gov't § 20-601; Nev. Rev. Stat. § 613.310; N.C. Gen. Stat. § 143-422.2; S.C. Code § 1-13-30.

[11] Cal. Gov't Code § 12926; Conn. Gen. Stat. § 46a-51; 19 Del. Code § 710; Ky. Rev. Stat. § 344.030; Mo. Stat. § 213.010; N.H. Rev. Stat. § 354-A:2; N.M. Stat. § 28-1-2; N.Y. Exec. Law § 292 (McKinney); Va. Code § 2.2-3903(B); Wash. Rev. Code § 49.60.040.

own agencies and employees would tip the scales toward the majority rule.

The Ninth Circuit turned *Gregory* on its head by demanding a clear statement that the ADEA does *not* apply to smaller state agencies and political subdivisions. It noted that Congress could have chosen statutory language that would have more clearly preserved a State's prerogative to hire or fire its own employees or excluded the smallest governmental entities. *See* Pet. App. 10a. But *Gregory* confronted, and rejected, this erroneous inversion of the clear statement rule. It recognized that the ADEA's language excluding state judges was "odd"—and that a more "efficient phrasing" was possible. 501 U.S. at 467. But the Court emphasized that "in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.*

If one proposition is clear from the briefs in this case—and the circuit split—it is that Congress did not *clearly* indicate an intention to interfere with state functions regarding the smallest agencies and political subdivisions. That reading is therefore improper.

2. For all the focus so far on the 20-employee minimum in the first sentence of § 630(b), we cannot forget that the same sentence has another limitation: The ADEA applies only to "a person engaged in an industry affecting commerce." If § 630(b)'s second sentence overrides the employee minimum, then it overrides the "affecting commerce" limitation as well.

So under the Ninth Circuit's reading, Congress extended the ADEA even to state agencies and political subdivisions that have no effect on commerce.

That would raise serious constitutional questions. This Court has repeatedly noted that the ADEA's coverage of public employers—no less than private businesses—is an "exercise of Congress' powers under the Commerce Clause." *Gregory*, 501 U.S. at 464 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). And other statutes show that when Congress brings public entities within the reach of federal power, it includes a Commerce Clause hook. Title VII, the ADA, and the Fair Labor Standards Act, for example, all include provisions that expressly qualify the public entities they reach as those engaged in an "industry affecting commerce" or an "enterprise engaged in commerce." 42 U.S.C. § 2000e(a), (b) (Title VII); *id.* § 12111(5)(A) (ADA); 29 U.S.C. § 203(s)(1)(C), (x) (FLSA). Without the Commerce Clause hook, Congress would have no stated constitutional authority for reaching a state agency or political subdivision. For this reason alone, the doctrine of constitutional avoidance, which "militates against" statutory interpretations that raise "serious questions of constitutionality," negates the Ninth Circuit's reading. Scalia & Garner, *supra*, at 247-48; *see, e.g.*, *Clark*, 543 U.S. at 380-81 (interpretation that does not "raise a multitude of constitutional problems ... should prevail"); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979).

If the second sentence does not negate the first sentence's "affecting commerce" limitation, then it cannot negate the 20-employee minimum either. Indeed, the "affecting commerce" limitation works

hand-in-glove with the employee threshold. Employee thresholds like these can be viewed as reflecting "Congress's determination ... that any employer" above the stated employee threshold "necessarily implicates interstate commerce." *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991). Aspects of Title VII's legislative history support that view: "The bill proceeds upon a theory ... that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured." H.R. Rep. No. 88-914 at 2475 (1963) (separate minority views of Reps. Poff and Cramer). That does not necessarily mean that Congress could not constitutionally reach a company with only 19 employees. But Congress did understand that a complete abandonment of all employee thresholds would raise constitutional issues.

Consider the ramifications: States have created countless agencies, commissions, and local entities with no meaningful effect on interstate commerce: the Prescott Historical Society, for example, which exists to preserve certain properties in the small city of Prescott, Arizona;[12] or the Franklin Township Cemetery District, whose sole employee maintains the cemeteries in a small Illinois town.[13] Under the Ninth Circuit's approach, the Cemetery District's sole employee could sue for age discrimination if the district concludes it can no longer afford him and will handle the

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[12] *See* Arizona State Library, Archives & Public Records, *Prescott Historical Society* (2016), https://tinyurl.com/y83dpeaq.

[13] *See* Franklin Township, *Township Cemeteries*, https://tinyurl.com/y7nvkj8n; Illinois Comptroller, *Financial Databases*, https://tinyurl.com/yb36wnoc (listing one employee for Franklin Township Cemetery District as of 2016).

function with volunteers or contractors. A sole employee could sue even if he worked only a few hours a year. In fact, a job applicant could sue any of these agencies even if the agency had no employees but merely interviewed her in contemplation of possibly creating a position. None of these scenarios would have any appreciable effect on interstate commerce. And without an effect on interstate commerce, the application would be unconstitutional. *See United States v. Morrison*, 529 U.S. 598, 609 (2000).

This Court must avoid these constitutional landmines, *see* Scalia & Garner, *supra*, at 249, by interpreting both limitations in § 630(b)'s first sentence to apply to all state agencies and political subdivisions.

II. Applying The ADEA's Employee Minimum To Political Subdivisions Best Achieves Congress's Stated Purpose And Aligns The ADEA With Other Antidiscrimination Statutes.

In rejecting the unanimous reading of the other circuits, the Ninth Circuit injected two incongruities that are at odds with Congress's stated and demonstrated intention. First, Congress's stated goal was to place public and private employers on an equal footing. Second, Congress intended to harmonize the ADEA with other antidiscrimination statutes that share its basic purposes and substantive scope. The Ninth Circuit's reading does just the opposite: It creates untenable rifts in how the ADEA treats public and private entities, and puts the ADEA out of sync with other antidiscrimination statutes. The Ninth

Circuit gave no plausible reason why Congress would have adopted such an incongruous approach, when only our reading "produces a substantive effect that is compatible with the rest of the law." *Koons*, 543 U.S. at 60.

A. The ADEA is part of a trio of antidiscrimination statutes designed "to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). The ADEA's principal comparator in terms of "aims" and "substantive prohibitions" is Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). As this Court has recognized, "[t]he ADEA and Title VII share common substantive features and also a common purpose." *McKennon*, 513 U.S. at 358. And Congress borrowed the ADEA's substantive prohibitions largely "*in haec verba* from Title VII." *Lorillard*, 434 U.S. at 584. The ADA, passed in 1990, followed the model of both Title VII and the ADEA. *See McKennon*, 513 U.S. at 357.

The ADEA and Title VII grew up side-by-side, and Congress has often looked to one to determine how the other should function. That is precisely what Congress did with regard to coverage of governmental entities. Both statutes started out excluding coverage for all governmental entities. *Supra* at 7; Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253. Then, Congress simultaneously worked on amendments to both statutes, adding States and their political subdivisions, but retaining the exclusion for the federal government. *See* Pub. L. No. 92-261, 86 Stat. 103 (bill amending Title VII, passed March 24, 1972); 118 Cong. Rec. 15894 (May 4, 1972) (statement of Sen. Bentsen) (noting March 7, 1972 introduction

of ADEA amendments). Congress passed the amendments to Title VII first, in 1972. There is no dispute that, under that amendment, States and their political subdivisions were subject to the same employee minimum that applies in the private sector. *See* Pub. L. No. 92-261, § 701(b).

The ADEA amendments were intended to mirror the revisions to Title VII by "put[ting] public and private employers on the same footing." *Kelly*, 801 F.2d at 271. When introducing the bill nearly contemporaneously with the passage of the Title VII amendments, the bill's sponsor, Senator Bentsen, explained that the bill duplicates Title VII's public-private parity. He quoted the committee report on the Title VII amendments, which emphasized that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." 118 Cong. Rec. at 15895. And he argued that "the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]." *Id.*

The following year, a special Senate committee on age discrimination issued a working paper reflecting the same parity principles. Special S. Comm. on Aging, 93d Cong., Improving the Age Discrimination Law (Comm. Print 1973). The committee observed that it was "difficult to see why one set of rules should apply to private industry and varying standards to government." *Id.* at 17. So, when urging the President to sign the bill into law, Senator Bentsen emphasized that "Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector."

120 Cong. Rec. 8768 (Mar. 28, 1974) (statement of Sen. Bentsen). Nothing in the legislative materials suggests that the public entities newly covered under the ADEA would be treated any differently from their private sector counterparts or differently from entities under Title VII. *Cf. Kelly*, 801 F.2d at 272 (noting that no congressional report "drew any distinction between the coverage of public and private employers").

B. The Ninth Circuit's reading creates disparities in the ADEA's treatment of public and private employers that Congress could not possibly have intended. In doing so, it also creates conflicts between the ADEA and its sister statutes that defy explanation. These disparities arise along three dimensions: the employee minimum, the "industry affecting commerce" requirement, and respondeat superior liability. Taken together, they would create a fractured and incoherent federal antidiscrimination regime.

Employee Minimum. First, of course, is the rift directly at issue here: Small private employers would be exempt from the ADEA, while small public employers would not. That distinction makes no sense. Congress has several reasons for exempting smaller employers from discrimination suits—every one of which applies with at least equal force to public entities:

1. As discussed more fully below (at 54-57), discrimination suits and compliance costs can be so burdensome as to sink an employer with a small budget.

2. Small employers have less staffing flexibility, so it is harder for them to preserve a job to avoid allegations of discrimination. *See Age Discrimination in Employment: Hearings before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare Committee on S. 830 and S. 788*, 90th Cong., at 47 (March 15, 16, and 17, 1967) (statement of Secretary of Labor Wirtz).

3. Congress wanted to conserve the EEOC's resources by focusing it on employers with a greater impact on the marketplace, leaving it to state and local authorities—if they so choose—to monitor discrimination in the many thousands of smaller workplaces. *See id.*

4. Relatedly, as discussed above (at 40-43), a smaller employer has less of an impact on interstate commerce, and so size is a crucial justification for Congress's decision to extend federal law under the Commerce Clause.

The Ninth Circuit offered no persuasive reason to view private and public employers as different in any of these respects. It merely posited that one might "imagine policy reasons" for the differential treatment. Pet. App. 16a n.10. "Perhaps," the court of appeals speculated, "Congress thinks that government agencies, even very small ones like the Fire District, can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of non-discrimination." *Id.* Common sense and experience suggest that an 11-employee fire district is no better able to absorb extraordinary costs

than an 11-employee for-profit enterprise. And there is no evidence—and no reason to believe—that Congress specifically wanted to make an example of smaller state agencies and local governments as compared to private employers of the same size.

Different employee minimums for the public and private sectors are even less tenable in light of Title VII. That statute—along with the ADA—applies the same 15-employee minimum to public and private employers alike. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). Under the Ninth Circuit's reading, therefore, the ADEA applies *more broadly* than its sister statutes in the public sector (where it imposes no employee minimum), but *more narrowly* in the private sector (where it imposes a higher 20-employee minimum).

It's inexplicable. Nothing in the text or legislative history of the ADEA or Title VII provides a basis for this incongruity. If anything, one would expect Title VII's coverage to be uniformly broader than coverage under the ADEA. Race, religion, nationality, and sex enjoy a high degree of protection under the Constitution; state action targeting such characteristics is subject to heightened scrutiny. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("race, alienage, or national origin"; strict scrutiny); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (religion; strict scrutiny); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2004) (sex; heightened scrutiny). But age-based classifications will rarely, if ever, violate the Constitution as long as they rest on proper state interests. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

Consistent with that distinction, Title VII's coverage in the *private* sector is broader than the ADEA's coverage—suggesting that "the problems addressed by Title VII" are "more serious than the problem of age discrimination." *Kelly*, 801 F.2d at 273 (citing *Wyoming*, 460 U.S. at 231). So it would be puzzling indeed for Congress to have flipped that hierarchy in the public sector, imposing more extensive coverage for less constitutionally suspect behavior.

Moreover, Title VII and the ADA squarely undercut the Ninth Circuit's speculation that Congress believed the smallest governmental entities "can better bear the costs" of litigation than private businesses. Pet. App. 16a n.10. Discrimination suits pose the same burdens whether they are based on age or on race, color, religion, sex, national origin, or disability. And Congress saw fit to exempt the smallest governmental employers from discrimination claims on all the latter bases. So it could not have reached some unstated, undocumented, and unfathomable conclusion that smaller state agencies and political subdivisions can better absorb the costs imposed by federal antidiscrimination law. Relatedly, there is no plausible reason that Congress would have wanted state and local governments to be "model[s] of non-discrimination," *id.*, in the context of age but not occupy the same iconic status regarding race, sex, religion, or disability.

Industry Affecting Commerce. As already demonstrated (at 40-43), the Ninth Circuit's reading also means that the ADEA reaches state agencies and political subdivisions that do not "affect[] commerce." Even if that were constitutionally permissible, it

would make no sense to selectively eliminate the congressional justification for public employers alone. As discussed (at 37-40), Congress must be more explicit about extending federal power to state and local governments than to private employers.

Here, too, this anomaly is even more pronounced in light of Title VII and the ADA, which expressly provide that public entities are covered only insofar as they affect commerce. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). There is no plausible reason to believe Congress wanted the Commerce Clause hook for two antidiscrimination statutes and not for the comparable third.

Respondeat Superior. Perhaps most startling of all, the Ninth Circuit's reading would also eliminate respondeat superior liability for all States and political subdivisions (of any size), while retaining it for private employers. Here is why: Under that reading, States and political subdivisions are not "person[s]" included in § 630(b)'s first sentence; they are an additional category of (non-person) employer added by the second sentence of § 630(b). That clause in the second sentence is not modified by the words "any agent of such a person," the basis for private-employer respondeat superior liability under § 630(b). So there would be no basis for imposing respondeat superior liability on public entities.

This, too, would be inexplicable even on its own terms. Under the Ninth Circuit's approach, private businesses would be liable for the discriminatory acts of their employees, incentivizing those businesses to eradicate discrimination by their personnel and

providing for compensation to adversely affected individuals where appropriate. But state and local governments would face liability only for their own official decisions and practices, and not for the unsanctioned acts of supervisors. There is no reason Congress would have wanted that—especially when it said it wanted to give public and private employees the same recourse. Nor can the notion be reconciled with the Ninth Circuit's hypothesis that Congress wanted to elevate state and local governments as paragons of non-discrimination.

Again, this feature of the Ninth Circuit's reading also creates an irreconcilable disparity between the ADEA and its sister statutes. Title VII and the ADA also codify respondeat superior through agent clauses. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). But those clauses apply to public as well as private employers. *See id.* So when it comes to discrimination on the basis of race, sex, nationality, religion, or disability, state and local employers generally must answer for the unsanctioned acts of their employees. It would be strange to abandon those fundamental agency principles for age discrimination.

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Together, these anomalies yield a haphazard ADEA. Under the Ninth Circuit's reading, the statute draws illogical distinctions between identically sized public and private entities. Worse still, the ADEA is at once broader and narrower than Title VII and the ADA with respect to small public employers. On the one hand, the ADEA would cover public employers of any size, while Title VII and the ADA subject these

employers to their employee minimums. But on the other, public entities are subject to a statutory Commerce Clause hook and to respondeat superior liability for purposes of Title VII and the ADA, yet not so under the ADEA. There is no rhyme or reason for this grab-bag of fundamental distortions.

C. The Ninth Circuit offered no rationale for why Congress would have sought to draw any of these distinctions. It just dismissed these problems because Congress amended Title VII in 1972 "us[ing] different language than it used in the 1974 ADEA Amendment." Pet. App. 15a. In the Ninth Circuit's view, "[i]f Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language." *Id.*

That might be persuasive if the two statutes had started in the same place. But they started with different phrasing. So it is only natural that they took a different route to the same place. Title VII started with a narrower definition of "person" than the ADEA. Congress expanded Title VII's reach to state and local governments in 1972 by amending that provision as follows:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in ~~bankruptcy~~ cases under title 11, or receivers.

Compare 42 U.S.C. § 2000e(a), *with* Pub. L. No. 88-352, § 701(a). Note that Title VII's definition of person did not encompass "any ... organized groups of persons," as the ADEA did. Consequently, the drafters could have been concerned that state and local governments were not clearly covered by the narrower definition of person, and therefore would not have been viewed as "employers" if Congress simply removed the express exclusion of state and local governments from the definition of employer. So rather than amend the definition of "employer," they opted to amend the definition of "person," and then maintain only the federal government exclusion in the next section, as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has ~~twenty-five~~ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or ~~a State or political subdivision thereof~~ any department or agency of the District of Columbia....

Compare 42 U.S.C. § 2000e(b), *with* Pub. L. No. 88-352, § 701(b). Notice also that this original definition of "employer" did not have the same "also means" locution as the ADEA's. So the drafters did not have the same simple option of moving a category from the exclusion side of the ledger to the inclusion side. To follow Title VII's model in the ADEA would have

entailed much more rewriting than the approach the drafters took.

In short, no inference can be drawn from the apples-to-oranges revisions. The fact that Congress enacted somewhat distinct changes to two statutes that were worded differently to begin with does not mean that Congress had different purposes in mind. Here, Congress aimed for harmony between Title VII and the ADEA, and the Ninth Circuit disregarded that understanding.

III. The Ninth Circuit's Rule Threatens The Survival Of Small Political Subdivisions.

The Ninth Circuit's reading of § 630 would have devastating effects on small state agencies and political subdivisions, a result Congress would not have intended. As indicated above (at 46-47), employee minimums serve important and salutary purposes, which apply to small political subdivisions like the Fire District just as much as they apply to small businesses. One purpose in particular bears elaboration: "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999); *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504 (2006); *Miller*, 991 F.2d at 587.

Small political subdivisions are especially vulnerable. They provide crucial services—fire protection, public safety, healthcare, utilities, pest control, and

the like—often in rural and sparsely populated communities. But their funding is usually modest. *See* Int'l Munic. Lawyers Ass'n Amicus Br. § II; Arizona Fire District Association, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, https://tinyurl.com/y7sybnva. The Fire District is a prime example. A small employer that tries to make ends meet with bake sales, *supra* at 11, is not the sort of employer that is well positioned to survive the expense of federal age discrimination litigation.[14]

The costs of learning a complex federal regulatory scheme alone are substantial. But a single litigation could bring a small governmental entity to a halt for years and even put it out of business. *See* Hiscox, *Guide to Employee Lawsuits* 7 (2017) (finding an average employment discrimination matter takes 318 days to resolve). One study found that out "of 1,214 closed claims reported by small- to medium-sized enterprises (SMEs) with fewer than 500 employees ... 24% of employment charges resulted in defense and settlement costs averaging a total of $160,000." *Id.* Even with insurance, small employers bore a significant portion of those costs. *See id.* ($50,000 average deductible).

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[14] That is why, for example, Congress was sure to single out the smallest fire and police departments as employers exempt from the Fair Labor Standards Act. *See* 29 U.S.C. § 213(20). As Representative Frenzel noted, Congress was worried that requiring such departments to pay overtime would "force municipalities to reduce their fire protection service." 120 Cong. Rec. 8605 (Mar. 28, 1974).

If the Ninth Circuit's decision becomes the law of the land, those costs will be brought to bear far and wide. There were over 38,000 special districts across the country in 2012. U.S. Census Bureau, *Special District Governments, supra*; U.S. Census Bureau, *State Descriptions, supra*, at x. A large percentage of those have fewer than 20 employees. For example, according to public data, Illinois had 1671 special districts with employees in 2016; over 60% of them had fewer than 20 employees. *See* Illinois Comptroller, *Financial Databases*, https://tinyurl.com/yb36wnoc. Even applying a more conservative estimate that, say, one-third of the country's special districts have fewer than 20 employees, that means over *12,000* entities are potentially affected.

The Ninth Circuit's decision extends to small state agencies as well. A substantial number of state agencies have fewer than 20 employees: 20 agencies out of 68 total in Arizona, 25 out of 89 in Idaho, 23 out of 77 in Oregon, and 33 out of 97 in Washington, just to name a few examples in the Ninth Circuit alone.[15] Even though private plaintiffs cannot directly sue state agencies for money damages, *Kimel*, 528 U.S. at

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[15] Arizona Dep't of Admin., *Arizona Workforce, supra* n.9, at 39-44; State of Idaho, *Active Employee Counts* (last updated May 4, 2018), available at https://tinyurl.com/cy25xp6 (click "Crunch the Numbers"); State of Oregon Legislative Fiscal Office, *2017-19 Budget Highlights* at C-1–C-3 (September 2017), https://tinyurl.com/ycv7qb48; State of Washington Office of Financial Management, *Distribution by State Agency* (last updated Apr. 16, 2018), available at https://tinyurl.com/ycxvbywc (click "Number of State Employees by Agency and County").

91, States and their agencies are still subject to the ADEA. The EEOC may enforce the statute in full, as multiple circuits have recognized. *EEOC v. Bd. of Supervisors for Univ. of La. Sys.*, 559 F.3d 270, 273 (5th Cir. 2009); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (extending *Kimel*'s reasoning to ADA but noting that the statute may still "be enforced by the United States in actions for money damages"). Private plaintiffs may also sue state entities for injunctive relief. *See Meekison v. Voinovich*, 67 F. App'x 900, 901 (6th Cir. 2003); *State Police for Automatic Ret. Ass'n v. DiFava*, 317 F.3d 6, 12 (1st Cir. 2003); *see also Garrett*, 531 U.S. at 374 n.9 (noting that ADA may "be enforced ... by private individuals in actions for injunctive relief under *Ex parte Young*"). Such actions are a significant and longstanding mechanism for enforcing the ADEA. *See Miller*, 991 F.2d at 587; *Harvey*, 913 F.2d at 227-28 & n.2. Exposing public entities to the ADEA regardless of size would have substantial and far-reaching effects.

Congress included an employee minimum in the ADEA and its kindred antidiscrimination statutes for good reasons, and reasons that apply just as strongly for small public entities as private ones. The Ninth Circuit's erroneous reading of the ADEA undermines that legislative choice. This Court should reject the Ninth Circuit's reading and hold that the ADEA's employee minimum exempts small political subdivisions from the statute's coverage.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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